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ABSTRACT

In considering the purposes of the Freedom of Information Act (FOIA), it is essential to keep in mind that the Act is not, and never could be, a statute with the singleminded purpose of disclosing government information. Many kinds of information that the government has in its possession must be kept confidential to protect important public interests. For example, agencies often must withhold information to protect the privacy of innocent third parties, to maintain the confidentiality of trade secrets, to avoid the disclosure of information affecting national security, or to prevent interference with pending civil, criminal, or administrative investigations, and protect the identities of confidential sources involved in any of these types of investigations. Also, since many agencies, in the course of operations, collect and maintain personal information about individuals, it is important to protect an individual's right to privacy. Senate Bill S.774 would amend the FOIA to correct the above problems and would allow agencies to charge a fair value fee for records containing commercially valuable technological information collected at public expense; establish more realistic time limits in processing requests; and establish guidelines for proper requests that would include limiting felons' requests, expediting journalists' requests, and limiting the scope of foreigners' requests. (CRH)

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STATEMENT

OF

CAROL E. DINKINS
DEPUTY ATTORNEY GENERAL

BEFORE

THE

COMMITTEE ON GOVERNMENT OPERATIONS
SUBCOMMITTEE ON GOVERNMENT INFORMATION
JUSTICE, AND AGRICULTURE
HOUSE OF REPRESENTATIVES

CONCERNING

FREEDOM OF INFORMATION ACT AMENDMENTS

ON

AUGUST 9, 1984

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Mr Chairman and Members of the Subcommittee:

I am pleased to appear before you today to testify in support of S. 774, a bill to amend the Freedom of Information Act. This bill sets forth a number of crucial and needed reforms in the provisions of that Act, while preserving entirely the salutary objectives of the FOIA in maintaining an informed citizenry. After careful consideration and refinement, this bill was unanimously approved by the Senate on February 27 of this year.

Former Assistant Attorney General Jonathan Rose appeared before this Subcommittee in July of 1981 to discuss proposed amendments to the FOIA then under consideration by the Administration. He told you then -- and I emphasize today -- that this Administration is firmly committed to the faithful implementation of the Freedom of Information Act by all federal agencies. We strongly support the basic purpose and philosophy of the Act: to inform the public as fully as possible of the conduct of its government in order to protect the integrity and effectiveness of the government itself. We are fully committed to carrying out the objectives and spirit of the Act.

We continue to strongly support this bill and we believe that it represents a successful compromise between the government's need to maintain the confidentiality of important law enforcement information and the public's right to know about the operations of its government. S. 774 also contains many needed

procedural reforms of the FOIA, including measures that would permit businesses that submit confidential information to the government to receive notice of its impending disclosure, allow the government to recoup a greater portion of the costs of processing many FOIA requests, and create more realistic time limits for the government to respond to FOIA requests.

I. Efforts by the Department of Justice to Implement the FOIA

Previous witnesses before the Subcommittee have raised certain concerns over the administration of the Act, suggesting that any revision to the FOIA is too controversial to consider at this time. They have pointed to a few anecdotes of delays in receiving responses or instances of perceived resistance by some government personnel, and they have then suggested that no amendment to the Act be made.

Who could doubt that some instances can be found where persons have encountered unnecessary difficulties in obtaining information under the Act? The administrative mechanisms of the various agencies of the government to implement the FOIA may not be perfect, but I submit that the few anecdotes that have been shared with the Subcommittee simply do not tell the full story.

For our part, the Department of Justice is engaged in a multifaceted effort to improve both the propriety and the accuracy of agency actions under the Act, pursuant to our statutory mandate to encourage agencies to comply with the FOIA (see 5 U.S.C. § 552(d)). Expert Department employees conduct a comprehensive series of seminars and course instructions to train

the personnel of other agencies on their proper responsibilities under the Act. We also publish an informative quarterly newsletter, FOIA Update, which is given wide circulation within the Executive Branch and sets forth the Department's guidance on a wide variety of issues, plus an inclusive FOIA Case List of judicial decisions and an analytical "Short Guide to the FOIA" describing the Act's substantive and procedural aspects. Our Office of Information and Privacy also responds to more than one thousand calls per year from agency personnel requesting advice on specific FOIA issues. We believe that these efforts contribute considerably to improving the administration of the FOIA by the various agencies.

Within the Department, the Office of Information and Privacy reviews all appeals of denials by any component of the Department of Justice. That Office is responsible for monitoring both the substantive decisions of the Department's various bureaus and divisions, and the timeliness of their responses.

Of course, the Department has no direct binding authority over the actions of the other Executive agencies, and those agencies must be free to exercise the judgment and expertise in their own fields of responsibility. But we do have authority to review the proposed litigation positions of all Executive agencies, where the Department of Justice represents them in court. Thus, although a relatively rare occurrence, the Department on occasion has declined to defend an agency's actions and has instead required settlement of a case.

II. Observations on FOIA Reform

The Department of Justice therefore welcomes these hearings and the opportunity to present for the benefit of the Subcommittee some of the facts about the administration of the FOIA. The agencies of the government, and the Department of Justice in particular, are in an excellent position to evaluate the effects of that Act. Persons who request information understandably can see only the delay in receiving a response, or the fact that some of the information they requested was withheld. Only those who take into consideration the perspective of the agency as well can fully understand why certain information is properly and necessarily withheld.

In considering the purposes of the FOIA, it is essential to keep in mind that the Act is not, and never could be, a statute with the single-minded purpose of disclosing government information. We all would agree, I am sure, that many kinds of information that the government has in its possession must be kept confidential, in order to protect important public interests. For example, agencies often must withhold information to protect the privacy of innocent third parties, to maintain the confidentiality of trade secrets, to avoid the disclosure of information affecting the security of the nation, or to prevent interference with pending civil, criminal, or administrative investigations, and protect the identities of confidential sources involved in any type of these investigations.

As important as the goal of openness may be, the countervailing interest in protecting such information from disclosure

often can be even more important. Government functions would be impaired, for example, if the tax records or census responses of individuals were made public merely for the asking, if businesses could readily obtain the trade secrets of their competitors, or if the government were required to disclose the identities of its confidential informants.

The FOIA, then, reflects a balance between two sets of public and governmental goals. It is not a matter of a struggle of good against evil, but a balancing of two good objectives. Amendments to the Act, therefore, cannot reasonably be evaluated by the simplistic measure of whether they provide for more or less disclosure. The proper standard is whether the proposed amendments will bring about a better balance between the several purposes of the Act. And in that analysis, it is not a sufficient answer to a problem to say, "There already is an exemption that covers that." The pertinent inquiry is whether or not that existing exemption is in point of fact functioning the way Congress intended, to protect against the designated harm. In many respects, we submit that such a careful evaluation of the FOIA indicates that certain aspects of the Act indeed are not functioning as Congress intended and instead disserve the public interest.

III. Discussion of Specific FOIA Reforms

Having discussed briefly the Department's general experience under the FOIA, and our efforts to encourage compliance by the Department and by other agencies, let me turn now to a discussion of the specific legislative proposals that the Senate has

unanimously approved. We candidly admit that these provisions would not solve all of the Department's concerns, particularly in the law enforcement area where the ingenuity of many criminals threatens the Department's ability to protect its essential investigatory information. We do believe, however, that these revisions would make an enormous improvement in those cases, such as organized crime, where the Department is most concerned about the adverse and unintended effects of the FOIA.

There is a long history of proposals to amend the FOIA. In the years following the substantial broadening of the Act in 1974, the Department of Justice and the government as a whole began to experience serious problems with some of the requirements and language of the FOIA. A study begun in 1979, following testimony before Congress, led former Attorney General Civiletti to prepare a comprehensive package of proposed amendments to the FOIA, recommending very substantial changes in the Act. I think it is important to remember that the Civiletti proposals were not so very different from the provisions of S. 774; indeed, in many respects they were more far-reaching.

When this Administration assumed office, the Department of Justice commenced an independent review of the problems that the FOIA has raised. As a result of that review, we concluded that the FOIA has indeed created serious problems for the federal government; however, we also found that -- as serious as these problems were -- they also tend to be narrow enough to be remedied without a wholesale revision of the FOIA. Accordingly, in October 1981, the Department testified before the Senate

Subcommittee on the Constitution to present the Administration's proposed amendments to the FOIA. That proposal was introduced in the 97th Congress as S. 1751 and H.R. 4505.

The Senate's Subcommittee on the Constitution gave extensive consideration to the issues relating to amendments to the FOIA, holding numerous days of hearings on all aspects of the proposals, hearings which fully considered all viewpoints.

As a result of this extensive consideration, many of the Administration's proposals were soon incorporated into existing FOIA reform legislation, S. 1730. Commendably, Senator Hatch and his colleagues, particularly Senator DeConcini and Senator Leahy, carefully engrafted our proposals onto the provisions of S. 1730, producing a compromise set of proposed amendments to the FOIA that were drawn as narrowly as possible. The central purpose of our common efforts was ensure that the changes made to correct the deficiencies of the FOIA should not inadvertently infringe upon the overriding purposes of the Act.

The final version of S. 1730 was an excellent example of carefully drafted remedial legislation. We at the Department of Justice found that the bill redressed most, although not all, of the serious problems we had encountered with the FOIA. For example, Director Webster of the FBI described the compromise as "an 8 on a scale of 10." Similarly, the various interest groups that initially had opposed <u>any</u> amendments to the Act acknowledged the compromise bill as a responsible and even-handed approach to reform of the FOIA.

The present bill, S. 774, is almost identical to S. 1730 from the last Congress. Three changes in the text of the bill were made by the Senate Judiciary Committee: first, a somewhat technical amendment changing the language of Exemption 7(C) from "would" to "could reasonably be expected to" result in an unwarranted invasion of personal privacy; second, a provision preventing an agency from retaining any of the FOIA fees they collect if it is found not to be in "substantial compliance" with the time limit provisions of the Act; and third, a provision requiring agencies to list in the Federal Register the Exemption 3 statutes upon which they intend to rely. With these few changes, the bill again was approved unanimously by the Senate Committee on the Judiciary. On February 27, 1984, the full Senate approved the measure by voice vote, with only two other changes: striking the term "royalty" from section 2 of the bill, and deleting the proposed technological data exemption in light of the special protection for such data provided by Congress in the Defense Department's 1983 authorization bill, codified at 10 U.S.C. § 140c.

Before turning to a summary of the specifics of this bill, I note that the Senate Judiciary Committee has amassed a considerable amount of testimony and other evidence during the course of considering this bill, comprising two volumes of hearings during the 97th Congress, and one volume of hearings in this Congress. Those hearings already have developed a substantial amount of the evidence in support of the reforms in S. 774.

Law enforcement. The FOIA has become a major problem to the government's law enforcement agencies. The FBI has found that 15% of the FOIA requests it receives are from criminals incarcerated in prison. In the case of the Drug Enforcement Administration, this number is even higher: 58% of the FOIA requests the DEA receives are from prisoners and another 21% from known drug traffickers. The frequency with which criminals use the FOIA is itself an indicator of its usefulness to them.

However, there also is direct evidence that the FOIA has been directly harmful to law enforcement efforts. In the course of the hearings held last Congress on S. 1730, the Department provided to the Senate Judiciary Committee a list of over 200 documented cases where the FOIA had a harmful impact on law enforcement activities. These are not isolated anecdotes, but rather are a stark reflection of the adverse effects of the Act in the specific area of criminal law enforcement. Moreover, in an executive session of the Senate Subcommittee, Director Webster of the FBI provided additional examples of the use of the FOIA by criminals, terrorist groups, and hostile foreign intelligence agencies. That information is available to this Subcommittee. In February 1982, the DEA released a study it had conducted that found that 14% of the DEA's investigations were aborted, narrowed, compromised, or significantly complicated by the FOIA.

The problems the FOIA creates for law enforcement agencies are especially acute when organized crime uses the Act to discover what the government knows about its activities and

members. Organized criminal groups engage in a wide range of illegal activities and often have a long institutional memory. As a consequence, otherwise innocuous information that the government discloses under the FOIA to a member of an organized crime family or a drug trafficking conspiracy often can be pieced together with information already known to the requester to form a "mosaic" that reveals the identities of the government's confidential informants or the scope of the government's investigation.

S. 774 has several types of provisions that address the concerns regarding law enforcement information. The provisions of Exemption 7 would be modified slightly -- not revised wholesale as some observers have asserted. The introductory language of the provision would be revised to include law enforcement information other than that developed in the course of a specific investigation -- for example, manuals of procedure or statements of prosecutorial priorities. Several of the specific standards of harm in Exemption 7 would be revised to cover information that "could reasonably be expected to" cause the specific harm -- e.g., identify confidential informants -- rather than the present standard that disclosure would cause that harm. The government of course would continue to bear the burden of proof in all cases, but this restatement of the necessary showing would give more appropriate recognition to the uncertainties that all too often prevail in the course of criminal investigations. Requiring certainty that disclosure would identify a confidential informant is too high a standard;

it should be sufficient that a reasonable person reasonably would expect that result.

The Department of Justice believes that the bill will go a long way towards closing this very critical gap in the government's ability to maintain the confidentiality of its law enforcement files.

Secret Service files. In past testimony before Congress, the Secret Service has revealed that many local police departments no longer share information with them because they believe that the Service will not be able to protect the information from mandatory disclosure under the FOIA. By 1977, according to its testimony, the Secret Service had lost so much useful information of this type that it recommended against visits by President Carter to two cities because of fears that the Service could not protect the President's personal safety. Moreover, in 1981 the Secret Service testified that its informant information had dropped by 75% since the passage of the 1974 amendments to the FOIA. We endorse S. 774's provisions granting broader protection to the files the Secret Service compiles in connection with its protective functions.

Commercial information. Every year, thousands of businesses submit to the government many of their most important and confidential trade secrets and business records. However, there is no requirement in the FOIA that the government must notify these companies when it intends to release this information to the public. The seriousness of this shortcoming was shown by the first panel of witnesses before this Subcommittee at the hearing

held this past May, who pointed to a number of concerns resulting from a lack of notice to submitters of sensitive business secrets prior to dissemination, and the resulting inability to oppose the disclosure either before the agency or in court. Moreover, providing submitters an opportunity to object to disclosure should lead to improved administrative decisionmaking based upon all the relevant information.

Many of these procedural improvements can be accomplished only by legislation -- for example, the provisions for judicial review of agency action. Even for those procedures that could be put in place by administrative action, the strict time limits of the Act presently make no express allowance for the time needed for the consultation process.

For these reasons, we support the bill's provisions requiring government agencies to notify businesses in advance whenever the agency intends to publicly release trade secrets or sensitive commercial information under the FOIA. S. 774 is a means to further the goal of the Act to conduct the government's business in the open. It would not create any new exemption for confidential business information. It would simply provide -- just as the Administrative Procedure Act does in so many other areas -- that the government will give private parties notice and an opportunity to object before it takes action affecting their interests.

Manuals and examination materials. As is explained more fully in the accompanying Detailed Analysis of S. 774, the FOIA

often compels the government to release the internal manuals and instructions that government agencies give to their investigators, auditors, and negotiators. Frequently, these materials set forth the government's confidential investigatory techniques and guidelines.

Public disclosure of these manuals significantly hampers the government's ability to enforce the law, detect fraud, or acquire goods and services at competitive prices, since subjects of investigations or government suppliers may learn in advance what the government intends to do. Because of the crucial role that manuals and guidelines play in the government's law enforcement and acquisition programs, we strongly believe that they deserve more complete protection.

Personal privacy. In the normal course of government operations, numerous government agencies collect and maintain many types of personal information about individuals -- whether for purposes of social insurance benefits, loan guarantees, taxation, law enforcement, federal employment, Veterans Administration medical care, or many other reasons. One can point to many laws Congress has enacted -- notably the Privacy Act of 1974 -- that exemplify the importance all of us attach to the interest in protecting personal privacy.

But the FOIA is anomalous, because it often permits a complete stranger to obtain access to government files that contain personal information about us. Often a requester's purpose is chiefly commercial -- credit bureaus, employment agencies, and life insurance companies rank among the most common users of the FOIA for this purpose -- but disclosure of personal

information about us is an invasion of privacy nonetheless. Any system providing for the public disclosure of government records must necessarily provide that information the government compiles about its citizens should be protected from those who would use it to invade our personal privacy.

S. 774 would amend the Act to make clear that Exemption 6 applies to all records relating to individuals, including lists that could be used for solicitation purposes. It would also amend Exemptions 6 and 7(A) to authorize withholding of personal information that "could reasonably be expected to result" in the specified harm to personal privacy interests. Although S. 774's amendments to the Act's privacy exemptions perhaps could go further -- for example, by changing the Exemption 6 standard to an "unwarranted" invasion of personal privacy -- we strongly support this effort to give Americans greater protection of their personal privacy.

Fees. One of the unexpected developments from the 1974 amendments to the FOIA has been the great volume of requests and the expense of processing those requests. Congress estimated that implementation of the 1974 amendments would cost no more than $40,000 to $100,000 annually. The direct cost of compliance with the Act by all agencies rose, however, to at least $61 million by 1981, according to the General Accounting Office, and it certainly is much higher today. Frequently, the cost to the government of search and review bears little correlation to the public interest in disclosure, yet only three or four percent of this cost is typically recovered from requesters. We strongly

support the goal of this bill to end public financing of requests that do not benefit the general public and to encourage all requesters to make reasonable efforts to narrow excessively broad requests.

We also endorse the bill's provision permitting an agency to charge a fair value fee for records containing commercially valuable technological information that was generated or procured by the government at substantial cost to the public, when the requester is likely to use the information for a commercial purpose and deprive the government of this commercial value. We believe that the government should not subsidize the development of commercially valuable information for the financial benefit of private commercial enterprises. We would also note that, in many cases, requests for such information deprive not only the government, but also the private firm that supplied the information to the government, of the information's commercial value. As noted earlier, the Senate has deleted the term "royalty," which caused concern among some groups as to its meaning.

Finally, I emphasize that the bill would retain the provision in the current law that requires an agency to waive or reduce existing search and duplication fees whenever a requested disclosure would primarily benefit the general public. Such waivers are intended to ensure that persons such as representatives of the media, public interest groups, and scholars have relatively inexpensive access to government records where disclosure of information to them would in turn be of primary benefit to the general public. The bill also provides for a

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categorical waiver of all new processing fees for researchers, journalists, and public interest groups. We believe that the bill's fee provisions overall represent a fair compromise in this sensitive area.

Time limits. The FOIA's unrealistic time limits have caused serious problems for the government and FOIA requesters alike. The short (10-day) time limit imposed on agencies for responding to and processing requests often forces agencies to respond prematurely or hurriedly. FOIA requesters, too, are dissatisfied with the present time limitations, which often mean that agencies are not in statutory compliance and occasionally have caused needless litigation. Moreover, under the "first-in, first-out" system established by the FOIA and the case law, even persons making relatively simple requests may find themselves placed at the end of the agency's backlog of requests received earlier. This may result in a delayed response as the agency strives to process earlier requests. Finally, there is currently no specific authority for agencies to extend the strict ten-day time limits in order to notify submitters of confidential business information that disclosure of their information has been requested. We endorse S. 774's approach to this problem, which establishes more realistic deadlines to guide agency conduct.

I would like to take special notice of a provision in S. 774 that, for some reason, has received little attention by the representatives of the press who testified earlier at these hearings. Several of those witnesses complained of delays experienced by journalists in obtaining information under the Act. Most often, such delays are simply the inevitable result of

the large backlogs of requests pending at particular agencies, combined with the courts' requirement to handle such backlogs in a first-come, first-served manner. Although journalists generally make up a very small proportion of requests at most agencies, they are inevitably affected by the backlogs of requests by others -- many of whom who seek information for their own use, not for any public interest. To ease this crowding-out problem to some extent, S. 774 would provide for accelerated consideration of FOIA requests made by the news media, and others who can demonstrate a need for expedited access to government records. We believe that this measure should respond to the concerns of the journalistic community without undermining the time limit provisions of S. 774 overall.

Proper requests. S. 774 also contains three other provisions that we think are particularly important. First, the bill would permit the Attorney General to issue regulations that impose limitations upon FOIA requests by imprisoned felons, where it is determined that the limitations are needed in the interests of law enforcement and would not contravene the purposes of the Act. Second, the bill would limit the use of the FOIA as a substitute for normal discovery rules by parties in litigation with the government. This would be accomplished by simply extending the rather rigid time limits of the Act with respect to requests from parties in litigation with the government who could just as easily use document discovery procedures to obtain the information. Third, S. 774 would limit the availability of the FOIA's public access provisions to United States citizens and

resident aliens. We believe that this change would eliminate a number of burdensome requests now made of the government by foreign citizens and corporations. However, it would not impinge in any sense upon the FOIA's central purpose of providing information to United States citizens about the operation of their government.

In a brief aside, Mr. Chairman, I would like to address your concern, expressed in a letter to the Attorney General after your hearings last year on the Privacy Act of 1974, about this provision limiting the strict obligations of the FOIA to those who are United States citizens or lawfully admitted resident aliens. Those hearings on the Privacy Act led you to the conclusion that, because aliens do not have enforceable rights under the Privacy Act (see 5 U.S.C. § 552a(a)(2)), they need to have continued access to records under the FOIA. We must respectfully disagree -- that to cure a minor perceived shortcoming in one aspect of the Privacy Act, the FOIA must be left with an expansive, open-ended obligation to give foreigners the same complete access as citizens have to information on the United States government and to information held by our government on citizens and on domestic businesses. If access by aliens to information on themselves held by the government is a significant concern, then perhaps this Subcommittee could consider a specific amendment to resolve that concern. Let me make clear that the Department of Justice has not yet taken any position on such a change.

That very specific concern should not, however, defeat an amendment to the FOIA intended to address a far larger and quite different concern. The amendment to the FOIA at issue would not preclude aliens in all cases from obtaining information from the United States government, but simply would provide that the full panoply of special procedural and substantive rights made available by the FOIA to American citizens -- strict time limits, narrow exemptions to disclosure, de novo judicial review, attorneys' fees, reduced fees, administrative sanctions for failure to disclose, and (if S. 774 were adopted) reverse FOIA procedures to protect the confidential business information of foreign corporations -- need not be extended to aliens as a matter of statutory right in every case.

List of Exemption 3 Statutes. Finally, S. 774 includes a provision added by the Senate to require each agency to publish in the Federal Register, within 270 days of enactment of the subsection, a list of all statutes upon which the agency proposes to rely to withhold information under Exemption 3 of the FOIA, and a description of their scope.

While the Department of Justice does not object to the requirement that all such exemption statutes be published in the Federal Register, we would suggest that this provision be clarified to provide that an agency could rely on any of the exemption statutes published by the Department of Justice, not simply those exemption statutes commonly relied upon and listed by that agency. The gist of Section 16 is to provide a single comprehensive list of exemption statutes, not to require each

agency to prepare a highly duplicative list of all of the exemption statutes that agencies governmentwide may rely on.

I hope that this summary of the important changes S. 774 would make is useful. However, I think that it also is useful to look at what S. 774 would not do. The bill would continue the substantive or procedural standards governing the disclosure of information that has been classified in the interests of national defense or foreign policy. Similarly, S. 774 would not change the scope or nature of the protections that the FOIA currently provides for trade secrets and confidential commercial information; as I have stated, the bill would do no more than give submitters of such information the right to be told of an intended disclosure and an opportunity to object. Overall, S. 774's narrowly-drawn protections should assist greatly in ensuring that agencies can strike the proper balance between the public's right to know and the government's need to maintain the confidentiality of non-public information.

In this regard, I think that it is important to point out once again just how well the Senate Committee has succeeded in striking this balance. In a study released in 1982, long before Senate passage of S. 774, a group categorically opposing any amendment of the FOIA listed over 500 instances where requesters had used the FOIA to obtain the disclosure of important

government information. 1/ The examples listed in the study covered the entire gamut of the information the government keeps, from consumer product safety information to national security information to tax information.

In his Senate testimony over one year ago, former Assistant Attorney General Rose explained that the Department had compared this study and S. 774 to gauge just how seriously this bill would have affected these hundreds of disclosures had it been in effect at the time. That study concluded that, of the more than 500 examples listed in the study, there were only four instances where S. 774 might have prevented the disclosure of the information in question -- and in each case there were sound reasons why the information that was required to be released should have been withheld. 2/

1/ Campaign for Political Rights, Former Secrets (1982 E. Hendricks ed.).

2/ Former Secrets, supra, pp. 53 (first and last examples) and 62 (first example), and 193 (last example). The first two examples both involved the disclosure of law enforcement files on organized crime, although it is unclear whether the particular documents that were disclosed were less than five years old, as S. 774 would require before they could be withheld. The first case involved allegations of organized crime's involvement in the American coal industry, while the second pertained to the Department of Justice's investigation of various Teamster pension funds. Both of the remaining examples are cases where internal government audit manuals were disclosed under the FOIA. The example recited on page 62 of the study was a request for an internal HUD audit manual. The example on page 193 of the study involved the disclosure of what appears to have been a multi-volume manual detailing auditing procedures for IRS agents.

In addition, there were seven examples of disclosure listed in the study where a request had been made by foreign

Although the opponents of S. 774 have had ample time to judge the results for themselves, no one has disputed this conclusion. Many of the witnesses before this Subcommittee have simply given examples of their use of the FOIA and praised its availability, but have not addressed the specifics of S. 774. Other witnesses made broad, generalized assertions that the provisions of S. 774 would have unspecified adverse results, but they have not made any effort whatsoever to provide concrete examples of harm.

Contrary to those unsupported expressions of concern, we believe that the evidence presented to this Subcommittee and to the Senate Committee on the Judiciary provides more than an ample basis to conclude that the provisions of S. 774 would in fact provide for greater protection against unwarranted disclosures while at the same time preserving the goals of public access under the FOIA. S. 774 would have virtually no impact upon the truly important public disclosures under the FOIA, yet would respond to many of the more than 200 documented examples where the Act has harmed law enforcement. This bill is a well-written and much needed proposal for adjusting the balance between disclosure and confidentiality that the FOIA is meant to embody.

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citizens -- in one case by the government of the Soviet Union and another by a suspected Palestinian terrorist. See pp. 32, 73, 101, 105, 141, 145 and 177. Under S. 774, all seven requests could have been denied because they were not made by United States citizens or resident aliens; however, the information would have continued to be available to any United States citizen or resident who made the same request.

* * *

In conclusion, I would like to thank you, Mr. Chairman, and the members of the Subcommittee, for your consideration of the proposed amendments to the FOIA which have now been so resoundingly approved by the Senate. I fully understand and appreciate your abiding concern to preserve the letter and spirit of the Freedom of Information Act, which this Subcommittee has authored and approved. I only ask that you give equal attention to the demonstrable harmful impact that the Act has had, in ways I am sure were not intended by this Subcommittee.

In our view, and in the view of the Senate, S. 774 will give the government very real assistance in preserving the necessary confidentiality of the important government files relating to law enforcement and other subjects, without infringing on the Act's goals. We can see no reason to perpetuate the unintended abuses of the FOIA that our experience has uncovered. This is particularly true when legislation is available which would significantly limit those abuses without affecting whatsoever the continued vitality of the FOIA to serve the purposes for which it was enacted: to ensure that informed citizens have the means to learn of the operations of their government and that government operates in an open and responsible manner.

We look forward to working with Congress to achieve the prompt passage of this legislation.

DETAILED ANALYSIS OF THE PROVISIONS OF S. 774

Fees and Waivers

Under existing law, agencies can collect only the costs of searching for and copying requested documents, which are only a fraction of the true costs of responding to a FOIA request -- less than 4 percent. The expense of reviewing documents, redacting exempt material, and performing other processing accounts for the remaining 96% of the total cost.

Section 1 would authorize agencies to recover from requesters fees which more nearly reflect the true costs of processing their FOIA requests. Besides encouraging agencies to recover a greater proportion of their costs, Section 1 would encourage all requesters to make reasonable efforts to narrow unduly broad requests.

The cost to the government of processing a request does not necessarily bear any correlation to the public interest in disclosure. The majority of all FOIA requests are filed by or on behalf of corporations for private, commercial reasons. In many instances, individuals have also made excessive use of the Act, at public expense, for reasons that are purely personal, that serve no public interest, and that may in some cases even be contrary to the public interest. In one case, a single Freedom of Information Act request for voluminous CIA documents by a renegade ex-agent, Philip Agee, cost the public nearly $500,000 to process. See Agee v. CIA, 517 F. Supp. 1335, 1342 n.5 (D.D.C. 1981).

Section 1 would allow agencies to collect "all costs reasonably and directly attributable to responding to the request, which shall include reasonable standard charges for the costs of services by agency personnel in search, duplication, and other processing of the request." The bill includes several provisions constraining an agency's authority to collect fees. First, no charge may be made in connection with any request that requires no more than two hours of agency processing time and for which no more than twenty pages are released. Second, any processing charges must be reasonable, standard charges and must be limited to services directly attributable to responding to the request. Third, the term "processing" is defined to exclude services of agency personnel in resolving issues of law or policy of general applicability in responding to a request. Thus, a requester would not be charged for an agency's costs in establishing or rethinking a policy of general applicability, even if the request triggers such agency action. However, a requester could be charged the costs of review and redaction of documents pursuant to established agency policy.

Fee waivers. The bill retains essentially the same standard as in current law for waivers of search and copying fees. An automatic waiver of the new processing fees would be made for noncommercial requests by (1) individuals or institutions conducting scholarly or scientific research, (2) journalists, and (3) non-profit groups intending to make information publicly available. The bill would not affect the ability of individuals to obtain records about themselves under the Privacy Act of 1974 for only the cost of copying the record. See 5 U.S.C. § 552a(f)(5).

Commercially valuable information. Section 1 also permits an agency to charge additional fees for information that has a commercial market value and has been compiled by the government at substantial expense to the taxpayer. This provision carries out the existing federal policy enunciated in 31 U.S.C. § 3302 (1982), and would avoid the anomaly in current law that permits a requester to reap personal profit from valuable technological information that all taxpayers paid to develop, and which he obtained at fees reflecting little more than the cost of duplication. The term "royalty" was deleted from this provision by the Senate.

Partial retention of fees. Finally, section 1 permits each agency to retain one-half of the fees collected under the FOIA to defray in part the agency's expenses in complying with the Act. This provision would not apply if the agency was found by the Office of Management and Budget or the General Accounting Office not to be in "substantial compliance" with the time limits of the FOIA.

Time Limits

Section 2 of the bill, while retaining the existing 10-day requirement for an initial response to a request, also provides more realistic time limits for processing burdensome FOIA requests and provides for expedited processing of requests that are made in the public interest.

The complexity and sheer volume of the requests received by many agencies often prevent compliance with the current time limits. Recognizing the inherent inability of many agencies to process requests within the specified time limits, many courts have freed agencies of the need to comply with time limits by resorting to use of the "exceptional circumstances" and "due diligence" provisions in section 552(a)(6)(C). In the leading case, Open America v. Watergate Special Prosecution Force, 547 F.2d 605, 616 (D.C. Cir. 1976), the court ruled that an agency exercising due diligence in processing a great volume of FOIA requests is not strictly bound by the ten-day provision; the agency may process them on a "first-in, first-out" basis, unless the requester can demonstrate to a court "exceptional need or urgency" for preferential treatment.

The present, very short time limits in the FOIA may cause agencies to process requests hurriedly, thereby increasing the likelihood of premature denials, unnecessary litigation, and serious errors. The inevitable delays at many agencies have led many requesters to a general dissatisfaction with the Act's operation, as well as to some needless litigation. Finally, the present "first-in, first-out" system prevents agencies that have a backlog of requests from responding promptly to many requests from the public and the news media, unless the requester can demonstrate "exceptional need or urgency."

Accordingly, Section 2 of the bill would allow an agency, in the case of "unusual circumstances," to extend its deadline from ten to thirty days. It would also specifically recognize an extension of the time limits on account of a substantial backlog of requests. Section 2 also would require each agency to promulgate regulations to provide that requesters who demonstrate a compelling need for expedited processing should be given processing priority over other requesters.

Business Confidentiality Procedures

Section 3 of the bill establishes a procedural route for the protection of confidential business information, requiring agencies to provide notice, an opportunity to object, and an opportunity to bring suit to oppose disclosure. However, the bill would not alter the substantive standard of Exemption 4.

Under these procedures, the submitter must designate, at the time of submission or thereafter, the information that is exempt under Exemption 4. The agency, upon receiving a request for the disclosure of such information, shall notify the submitter of the request, describe the nature and scope of the request, and inform the submitter of his right to object to disclosure. Notice to submitters is not required in five specified circumstances. Whenever the agency determines to disclose such information, notwithstanding the objections of a submitter, the agency must give the submitter at least ten working days notice of intent to disclose. Nothing in these procedures alters other rights established by law protecting the confidentiality of private information -- such as the Trade Secrets Act, 18 U.S.C. § 1905, the Census Act, 13 U.S.C. § 301, or the Internal Revenue Code, 26 U.S.C. § 6103.

These provisions would permit a submitter, who is frequently more aware of the commercial value of information than is the government, to inform the government why the submitter believes the information should not be released. For these reasons, these proposed provisions should be beneficial not only to the submitter, but also to the government.

Judicial Review

Section 4 of the bill would amend section 552(a)(4)(B) of the Act to include a limitations period of 180 days for judicial review of an agency's denial of a request for disclosure. This is for administrative efficiency, to allow the closing of old request files, but would not prejudice requesters. The 180 day period is the same as that set forth in a number of other administrative enforcement provisions. See, e.g., 42 U.S.C. §§ 2000e-5(e) and 2000e-16(c) (Title VII employment discrimination); 42 U.S.C. § 3612(a) (housing discrimination); and 29 U.S.C. § 633a(d) (age discrimination).

Section 4 also would amend the FOIA to provide district court jurisdiction over suits to enjoin disclosure of trade secrets or other commercially valuable information provided to the government by a submitter. Currently, submitters have no direct right of action but must resort to an action under the Administrative Procedure Act, 5 U.S.C. § 706, to enjoin violations of the Trade Secrets Act, 18 U.S.C. § 1905. See Chrysler Corp. v. Brown, 441 U.S. 281, 285, 317-18 (1979). The bill would also provide for notice to both submitters and requesters that a suit to enjoin the withholding or disclosure of records has been filed, and for the district courts to have personal jurisdiction, in any suit filed under the Act, over all requesters and submitters of particular information. These proposed provisions would ensure that an adverse party, whether submitter or requester, would receive notice of the complaint, have the right to intervene, and be bound by the court's decision.

Section 4 would also amend the provision of the Act authorizing the award of attorney fees in favor of a requester who "substantially prevails" in the litigation to authorize the award of attorney fees against submitters, as well as against the government. Thus, in disputes between a submitter and a requester, where the government's position is essentially that of a stakeholder of the disputed information, this provision would allow the court to charge the costs and attorney fees of a requester who substantially prevails against a submitter rather than against the United States. As under present law, the provision would authorize the award of attorney fees only in favor of requesters who substantially prevail, and even then the award would be discretionary.

Public Record Requests

Section 5 of S. 774 would amend the FOIA to eliminate the need for federal agencies to retrieve, duplicate, and mail records that are already publicly available. Requests that agencies disclose such documents often require employees to duplicate hundreds of pages of newspaper and magazine articles that a requester, with no greater effort, could locate and copy at the nearest public library. As Professor (now Circuit Judge) Antonin Scalia observed, there is no reason why federal agencies

should be compelled to act as "the world's largest library reference system." 1/ In the case of public record items such as newspaper clippings and court records, Section 5 would implement that recommendation by allowing agencies the choice of providing an index identifying the date and source of public records (but only if the index already is in existence) or producing copies of the documents.

Clarify Exemptions

Section 6 of the bill merely clarifies the fact that the compulsory disclosure requirements of the Act do not apply to the exemptions listed in the paragraphs of section 552(b).

Manuals and Examination Materials

Section 7 of S. 774 would make clear that materials whose confidentiality is necessary to effective law enforcement and other vital government functions are exempt from disclosure. Such materials include manuals and instructions to investigators, inspectors, auditors, and negotiators. Although materials of this nature are arguably protected under present law, the courts

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1/ Freedom of Information Act: Hearings on S. 587, S. 1235, S. 1247, S. 1730, and S. 1751 Before the Subcommittee on the Constitution of the Senate Committee on Judiciary, 97th Cong., 1st Sess. 953 (1981) (statement of Antonin Scalia, Professor of Law, Univ. of Chicago Law School).

are divided over the application of Exemption 2 to law enforcement manuals 2/ and to audit guidelines. 3/

This confusion reflects the conflicting legislative history of Exemption 2. According to the Senate committee report, it was intended to relate only to internal personnel rules and practices of an agency, such as the agency's rules about its employees' use of parking facilities or its policies concerning sick leave. 4/ The House committee report, on the other hand, stated that the exemption should protect from disclosure the operating rules, guidelines, and manuals of procedure for government investigators or examiners. 5/ Moreover, a related provision of the Act, subsection (a)(2)(C) (which requires an agency to make available

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2/ One court granted a pro se Freedom of Information Act litigant access to all portions of the Drug Enforcement Administration Agents Manual other than those pertaining solely to internal housekeeping matters, Cox v. Department of Justice, 576 F.2d 1302 (8th Cir. 1978), only later to deny to that same pro se litigant the portions of the Federal Bureau of Investigation's Manual of Instruction relating to investigative techniques and procedures. Cox v. Levi, 592 F.2d 460 (8th Cir. 1979). See also Cox v. Department of Justice, 601 F.2d 1 (D.C. Cir. 1979) (same pro se litigant denied access to portions of United States Marshals Service Manual describing procedures for transporting prisoners in custody); Sladek v. Bensinger, 605 F.2d 899 (5th Cir. 1979) (portions of Drug Enforcement Administration Agents Manual concerning DEA's handling of confidential informants and search warrant procedures ordered disclosed); Caplan v. Bureau of Alcohol, Tobacco & Firearms, 587 F.2d 544 (2d Cir. 1978) (entire BATF pamphlet concerning raids and searches withheld from disclosure).

3/ Compare Hawkes v. IRS, 507 F.2d 481 (6th Cir. 1974) (Internal Revenue Service audit guidelines ordered disclosed), with Ginsburg, Feldman & Bress v. Federal Energy Administration, 591 F.2d 717 (D.C. Cir.), vacated, reheard en banc, aff'd by an equally divided court, 591 F.2d 752 (D.C. Cir. 1978) (per curiam), cert. denied, 441 U.S. 906 (1979) (Federal Energy Administration guidelines for audits of refiners' reports withheld from disclosure).

4/ Senate Committee on the Judiciary, Clarifying & Protecting the Right of the Public to Information and for Other Purposes, S. Rep. No. 813, 89th Cong., 1st Sess. 8 (1965).

5/ House Committee on Government Operations, Clarifying & Protecting the Right of the Public to Information, H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966).

to the public "administrative" staff manuals and instructions to staff that affect a member of the public) implies a distinction for law enforcement manuals or guidelines for auditing and inspection procedures.

The bill would resolve this confusion by expressly protecting confidential information in manuals and instructions to investigators, inspectors, auditors, and negotiators from disclosure. This change complements the amendment to Exemption 7(E) relating to guidelines for law enforcement investigations or prosecutions. See generally, Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051 (D.C. Cir. 1981). The inclusion of negotiators in this list reflects the government's legitimate need to maintain the confidentiality of its instructions to staff in contexts other than law enforcement, such as government procurement programs. The term "negotiators" should include not only law enforcement personnel who are called upon to negotiate the settlement of pending and impending litigation, but also agency staff who conduct negotiations for the procurement of goods and services, the acquisition of lands, the resolution of labor-management disputes, the release of hostages, or any other negotiations conducted in the course of carrying out a legitimate governmental function where the release of such instructions or manuals may jeopardize the success of the negotiations.

The addition of Exemption 2(B), relating to testing or examination materials used to determine individual qualifications for employment, promotion, and licensing, would protect from disclosure materials that would compromise the objectivity or fairness of the testing, examination, or licensing process within various agencies. A similar provision exists in the Privacy Act of 1974, 5 U.S.C. § 552a(k)(6).

Personal Privacy

Section 8 of the bill changes the FOIA's personal privacy exemption (Exemption 6) in three respects. The change in the threshold language to cover all "records or information concerning individuals" and to eliminate the existing "similar files" language is intended to reinforce the correctness of the Supreme Court's decision in United States Department of State v. Washington Post Co., 456 U.S. 595 (1982), where the Court repudiated a formalistic reading of "similar files" by the U.S. Court of Appeals for the District of Columbia Circuit.

The bill also would reconcile the FOIA and the Privacy Act on the matter of disclosure of lists of names and addresses. The Privacy Act of 1974, 5 U.S.C. § 552a(n), currently provides that "[a]n individual's name and address may not be sold or rented by an agency unless such action is specifically authorized by law," and the accompanying Senate Committee Report stated that the disclosure of mailing lists by the government is "totally

inconsistent with the purposes of the bill." 6/ Nevertheless, some courts have required such disclosure. 7/ This provision should provide somewhat greater protection against this abuse by making agencies' disclosure of such lists expressly subject to FOIA Exemption 6. This would be in line with the Third Circuit's conclusion that the disclosure of mailing lists is "wholly unrelated to the purposes behind the Freedom of Information Act and was never contemplated by Congress in enacting the Act," 8/ and the Ninth Circuit's recent decision that "commercial interest should not weigh in favor of mandating disclosure of a name and address list. . . . FOIA was not intended to require release of otherwise private information to one who intends to use it solely for personal gain." 9/

Section 8 also modifies the standard of proof by allowing agencies to withhold records when disclosure "could reasonably be expected to" result in a clearly unwarranted invasion of personal privacy. Despite the importance of the right to individual privacy, which Congress has sought to protect in the Privacy Act of 1974, 5 U.S.C. § 552a, and the Right to Financial Privacy Act of 1978, 12 U.S.C. § 3401, et seq., many credit bureaus, employment agencies, and other third parties routinely attempt to use the FOIA to acquire financial and personal information about individuals. The current law, which has been construed as "an imposing barrier to nondisclosure" that weighs "heavily in favor of disclosure," 10/ hinders the government's ability to protect individuals legitimate privacy interests. Although it retains the "clearly unwarranted" language, the language of Section 8 allows greater leeway to protect the rights of individuals against inquiring third parties by permitting agencies to

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6/ Senate Committee on Government Operations, Protecting Individual Privacy in Federal Gathering, Use and Disclosure of Information, S. Rep. No. 93-1183, 93d Cong., 2d Sess. 31 (1974).

7/ National Western Ins. Co. v. United States, 512 F. Supp. 454 (N.D. Tex. 1980); Disabled Officer's Ass'n v. Rumsfeld, 428 F. Supp. 454 (D.D.C. 1977).

8/ Wine Hobby USA, Inc. v. IRS, 502 F.2d 133, 137 (3d Cir. 1974).

9/ Minnis v. United States Department of Agriculture, No. 83-4089 (9th Cir. May 22, 1984), slip op. at 4.

10/ Kurzon v. Department of Health and Human Services, 649 F.2d 65, 67 (1st Cir. 1981). See also Washington Post Co. v. Department of Health & Human Services, 690 F.2d 252 (D.C. Cir. 1982).

withhold information whenever disclosure "could reasonably be expected" to cause a clearly unwarranted invasion of personal privacy.

Law Enforcement

Section 9 of the bill makes several significant improvements in the language of Exemption 7, which protect law enforcement files from mandatory disclosure. Exemption 7 authorizes the withholding of law enforcement investigatory records only to the extent the government can demonstrate that one or more of six specific categories of harm will be caused by the release. While this exemption is intended to protect the government's important law enforcement interests, it has proved to be inadequate in practice.

The Department of Justice has extensive experience with the problems caused by the application of FOIA to criminal law enforcement agencies. Of the more than 61,000 requests for access to records of the Department received in 1982, a significant portion were directed specifically to the Department's criminal investigatory agencies, the Federal Bureau of Investigation (which received over 15,000 such requests) and the Drug Enforcement Administration. Significantly, a large number of these requests -- nearly 80 percent at the DEA -- were from convicted felons or from individuals whom the FBI and DEA believe to be connected with criminal activities. Such requesters have made extensive use of FOIA to obtain investigatory records about themselves or to learn the scope of ongoing investigations, identify government informants, and uncover government law enforcement techniques. One suspected organized crime "hit man" has filed over 137 FOIA requests for this purpose, and others have boasted that they have used the FOIA for the purpose of identifying informants.

A mainstay of law enforcement today is the volunteered statements and background information provided to federal agencies by confidential sources, particularly for key criminal enterprises relating to narcotics, organized crime, and extremist violence. However, because of the large volume of FOIA requests from known or suspected criminals, many sources -- private citizens and "street" informants alike -- have become reluctant to assist the FBI or DEA because of fears that the government cannot protect their identities. Moreover, this perception exists not only among individual informants, but also state and local law enforcement agencies, who fear losing their own sources of information when the federal government discloses the information they have.

S. 774 would close gaps in the coverage of Exemption 7, helping to give better protection to law enforcement files and to dispel perceptions that the government cannot protect the identities of its confidential sources. The current threshold language of Exemption 7 means that records are eligible for

protection only if they are "investigatory records" compiled for law enforcement purposes. See FBI v. Abramson, 456 U.S. 615 (1982). The bill would eliminate this "investigatory" requirement and would apply Exemption 7 generally to all "records or information" compiled for law enforcement purposes. This language would expand the categories of documents eligible for protection under Exemption 7 to include certain types of background information, law enforcement manuals, procedures, and guidelines.

Pending investigations. Section 9 also amends the language of Exemption 7(A) to ensure better that ongoing law enforcement investigations will not be compromised by the FOIA. The standard of harm would be changed from the present test -- whether or not disclosure "would" interfere with a pending proceeding -- to exempt all records or information the disclosure of which "could reasonably be expected to" interfere with enforcement proceedings. Even so, this change in the standard of harm, as welcome as it is, would not protect law enforcement agencies against the burden of responding to FOIA requests by the targets of law enforcement investigations -- a practice that can significantly hinder the agency's conduct of ongoing investigations. 11/

Confidential sources. Similarly, Exemption 7(D) would be amended from its current language protecting against disclosure of information that "would" disclose the identity of a confidential source. Under S. 774, an agency could withhold information that "could reasonably be expected to disclose the identity of a confidential source" -- including information that may not itself identify an informant but that, when viewed in context with other information known to a requester, could enable a requester to piece together facts that reveal the identity of a informant. The bill would also confirm that state, local, foreign governments and private institutions can be "confidential sources" within the meaning of Exemption 7.

Law enforcement guidelines. The bill would amend Exemption 7(E) to grant broader protection to records containing statements of law enforcement or prosecutorial guidelines. This would fill the gaps in the current language of Exemption 7(E), whose limitation to "investigative techniques and procedures" has proven insufficient to protect many sensitive law enforcement materials from disclosure. 12/

11/ See, e.g., Kanter v. IRS, 433 F. Supp. 812 (N.D. Ill. 1977), dismissed, 478 F. Supp. 552 (N.D. Ill. 1979) (IRS required to file 13,000-page affidavit to support withholding of investigatory records).

12/ See, e.g., Jordan v. Dep't of Justice, 591 F.2d 753 (D.C. Cir. 1978) (U.S. Attorney manuals and guidelines).

Personal safety. The current language in Exemption 7(F) exempts records only if their disclosure would endanger the life of a law enforcement officer. However, the exemption does not give similar protection to the life of any other person. S. 774 expands Exemption 7(F) to include such persons as witnesses, potential witnesses, and family members whose personal safety is of central importance to the law enforcement process.

Informant files. Under current law, criminal organizations can use the Act to attempt to uncover suspected informants in their midsts simply by asking for the records of individuals whom they suspect of being informants. In such cases, it is not sufficient that the FBI could respond that it is withholding the informant's file under Exemption 7(D), because the very step of specifying that exemption identifies the person as a confidential source. The bill would add a new subsection (a)(9) to the FOIA that would solve this problem by excluding the informant files of law enforcement agencies from the scope of the Act whenever those records are requested by a third party according to the informant's name or personal identifier. Under this amendment, the agency could properly limit its response to any collateral records or, if no such other records exist, properly respond that it has no records responsive to the FOIA request.

Organized Crime

Law enforcement agencies have found that organized criminal elements have attempted to use the Freedom of Information Act to uncover government informants in their midsts or to discover information concerning government investigations. Organized crime has the incentive and the resources to use the Act systematically to gather, analyze, and piece together disparate, often apparently innocuous pieces of information obtained from government files into a "mosaic" that reveals the full scope of the government's investigations and, perhaps, the identities of the government's informants. Application of the Act to such files thus presents a significant risk of inadvertent disclosure of harmful information. Indeed, in some cases, acknowledgement of the very existence or non-existence of records relating to particular investigatory activities or designated individuals provides valuable information to criminal organizations.

Section 13 of the bill would rectify some of these problems. The Attorney General would be authorized to designate lawful investigations of organized crime conducted for criminal law enforcement purposes for protection under a new subsection (c) of the FOIA. Any document compiled in the course of those special investigations would not be subject to disclosure under the FOIA for five years after they were generated or acquired. (The subsection also provides for the Attorney General to promulgate regulations for an earlier disclosure, or a longer exclusion up to three more years, in cases of overriding public interest.) Notwithstanding any other provision of law, such documents must

remain available for disclosure of non-exempt portions for ten years after the expiration of this exclusion.

Reasonably Segregable

Section 11 would clarify the current requirement that agencies disclose information that is reasonably segregable from exempt portions of documents. The bill authorizes agencies to take into account the potentially harmful effect of disclosing parts of sensitive law enforcement or national security records that can supply the "pieces" to complete a mosaic picture.

The purpose of the "reasonably segregable" requirement in the 1974 amendments to the Act was to require government agencies to release any meaningful portion of a requested record that could be separated from portions that were specifically exempt from disclosure. The courts have often strictly enforced this policy. While much useful and nonconfidential information has been released under this clause, both the courts and the agencies have expressed concern that some "reasonably segregable" information may actually prove threatening to national security and law enforcement interests when pieced together with other non-exempt or publicly available information.

Exemption for Secret Service Records

The bill would add a new Exemption (b)(10), intended to assist the Secret Service in maintaining the confidentiality of information required to carry out its important protective functions. The 1974 amendments to the FOIA have severely limited the amount of informant information available to the Secret Service, thereby jeopardizing its ability to safeguard the President and other important individuals.

Proper Requests

Section 12 of the bill would amend the provisions of subsection (a)(3) of the Act to address three important types of use or abuse of the Act not foreseen by Congress.

Under current law, an agency is required to comply with any request for records covered by the FOIA made by "any person." The bill would amend the Act to require the agency to make information available only to a requester who is a "United States person." Restricting the right to make requests to United States persons would reverse the present rule that "any person," including foreign nationals and governments, can use the FOIA to secure information. This proposed amendment is consistent with the purpose of the FOIA to inform the American public of government actions. It would also prevent the use of the FOIA by foreign nationals and governments for purposes which may be contrary to our national interest.

Section 12 would also amend the Act to limit the ability of a party to a pending judicial proceeding or administrative adjudication, or any requester acting for such a party, to use the Freedom of Information Act for any records which may be sought through discovery in the proceeding. Many government agencies report significant numbers of such requests, whose purpose is often to avoid applicable rules of discovery and sometimes -- where the government is a party -- to harass and burden government agencies. The bill would toll the FOIA time limits for response whenever a party files a request relating to the subject matter of a pending judicial or administrative adjudication in which the government is a party and may be requested to produce the records sought. This would allow the request for records to be supervised by the judicial or administrative tribunal in conjunction with the entire proceeding.

Finally, the bill would authorize the Attorney General, by regulation, to set conditions for the use of the FOIA or the Privacy Act by imprisoned felons, to the extent that these conditions are not in derogation of the purposes of the FOIA. This will authorize reasonable limitations on the use of the FOIA by prisoners to identify informers or to obtain other law enforcement information. At present, almost 60% of the FOIA requests to the DEA are from imprisoned drug offenders, and some prisoners have filed literally dozens, even hundreds, of FOIA requests.

Reporting Uniformity

Section 14 of the bill would amend the reporting requirements of subsection (d) of the FOIA to provide for the filing of reports on December 1 of each year covering the preceding fiscal, rather than calendar, year. Most agencies maintain their records on a fiscal year basis and must convert them to an annual year basis in order to comply with existing law. The amendment would remedy this problem by conforming the reporting requirement to data collection practices.

Definitions

Section 15, provides specific definitions for six critical terms and phrases to be utilized in the application of the amended Freedom of Information Act. These six phrases are: "agency," "submitter," "requester," "United States person," "working days," and "organized crime."

Publication of Exemption 3 Statutes

Section 16 provides for a new subsection (g) of the FOIA, requiring each agency to publish in the Federal Register, within 270 days of enactment of the subsection, a list of all statutes upon which the agency proposes to rely to withhold information under Exemption 3 of the FOIA, and a description of their scope. The Department of Justice shall thereupon publish a consolidated

list of all such statutes. After the 270 day period, or 30 days after subsequently enacted statutes, no agency may rely upon a statute not listed as a basis for withholding information.

While the Department of Justice does not object to the requirement that all such exemption statutes be published in the Federal Register, we would suggest that this provision be clarified to provide that an agency could rely on any of the exemption statutes published by the Department of Justice, not simply those exemption statutes commonly relied upon and listed by that agency. The gist of Section 16 is to provide a single comprehensive list of exemption statutes, not to require each agency to prepare a highly duplicative list of all of the exemption statutes that agencies governmentwide may rely on.